

Protest of) Date: December 27, 1991
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OSM CORPORATION)
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Solicitation Nos. 479990-91-A-P205,) P.S. Protest Nos. 91-59,
059990-9-A-E107, 104230-91-A-0175) 91-61, 91-67

DECISION

OSM Corporation (OSM) timely protests contracting officers' determinations that it was nonresponsible on two solicitations for postal equipment and also protests the Postal Service's award of a third contract on a noncompetitive basis.

Solicitation No. 479990-91-A-P205 (Protest No. 91-59)

Solicitation No. 479990-91-A-P205 was issued on May 6, 1991, by the Memphis Procurement & Materiel Management Service Center (P&MMSC) for 6,004 welded wire mesh containers. The solicitation placed specific emphasis on the average unit price of offers. Offers were due on June 6, 1991. Best and final offers were requested on June 17, and due no later than June 28. OSM was the apparent low offeror. Following the preaward survey which was conducted at OSM's facility on July 24 and 25, the contracting officer notified OSM by letter dated August 8, 1991, that it was determined nonresponsible for this solicitation because of the negative information obtained about OSM during the survey.

OSM responded by letter dated August 12, 1991, requesting that the contracting officer "reconsider and withdraw" his determination. OSM also stated that should he fail to do so, OSM's letter would then serve as a protest. In its letter, OSM argues that the contracting officer's finding of nonresponsibility was a mistake and unfair. OSM also disputes the findings of the preaward survey. By letter dated August 23, the contracting officer responded to OSM's August 12th protest letter, denying it as obviously without merit. In his response the contracting officer noted the following:

During the pre-award survey, it was determined that proper planning in the subcontract area was not complete. One example is the subcontractor for wire mesh [Nelson] only quoted for enough wire to complete 500 containers. In your letter of protest, you state that the quote was for 500 containers per month but that Nelson's letter did not say it was a per month quote. Another example of incomplete planning was no quotes on the hardening of the tow pins and you thought no quote was needed. You state in your letter the cost of hardening the

pins is less than 1/2 of 1% of the total cost and is available from many sources in the area. You did not think it was necessary to get a firm quote.

The last example is your painting capability. Our report lists only one paint gun of the type needed to paint wire with the quality of finish required. This report also disagrees with your estimate of capability and indicates you have underestimated the required workload. Your painting system has been determined inadequate to provide for this solicitation's requirement.

These are some of the same conditions that attributed to your failure on contract number 479990-90-B-0215. Your lack of planning in the above areas and your unsatisfactory performance on the above past contract, exhibits the inability of OSM to meet the requirements of the solicitation without significant quality problems and delinquent deliveries.

On August 29, this office received, by facsimile, a three-sentence protest from OSM against the subject solicitation.^{1/}

In the contracting officer's statement, he elaborates on the reasons (listed in his August 23rd letter to OSM) for his determination of nonresponsibility. The contracting officer reiterates that OSM's lack of planning in listed areas and its unsatisfactory performance on the referenced past contract (No. 47990-90-B-0215) "exhibits the inability of OSM to meet the requirements of the solicitation without significant quality problems and delinquent deliveries." The contracting officer further states that because he could not determine whether OSM was responsible, he made a "correct and proper determination of nonresponsibility in accordance with PM 3.3.1 e.1." OSM did not file any response to the contracting officer's report.

Solicitation No. 059990-9-A-E107 (Protest No. 91-61)

Solicitation No. 059990-9-A-E107 was issued April 26, 1991, by the San Bruno P&MMSC for, among other things, item PSIN-144-D, carrier case with adjustable shelf. The total requirement for cases was divided into two line items with awards to two contractors anticipated. Offers were due May 24.

Seven offers were received, and, after best and final offers were evaluated, OSM and Dehler Manufacturing Company (Dehler) were ranked first and second, respectively. Preaward surveys were conducted at the plants of the two low offerors. Dehler was found to be responsible, and a contract for one part of the case requirement was awarded to it on July 23, 1991. The contracting officer, however, determined that OSM did not have the capability or financial capacity to perform the contract on time and

^{1/} The protest simply stated:

We would like to protest Solicitation No. 479990-91-A-P205 from Memphis, TN.

We have attached the correspondence in the order that we received it and will forward hand copies by mail.

We disagree in his determination in all aspects.

found it nonresponsible.

On August 13, the contracting officer awarded a contract to Jebco, Inc. (Jebco), the third ranked offeror for the remainder of the case requirement. OSM received notice of the award to Jebco, on August 19.¹⁷ On that same day, OSM requested that the contracting officer reconsider the award to Jebco, as OSM's price per unit was below Jebco's, and identified the letter as its protest should the contracting officer fail to reconsider. By letter dated August 28, 1991, the contracting officer denied OSM's protest as obviously without merit and set out the deficiencies she found in OSM's capabilities to perform this contract. By letter dated September 4, 1991, OSM protested to this office, attaching the contracting officer's August 28 letter and stating, "We disagree in her determination in all aspects".

In her statement, the contracting officer states that the manufacturing information on OSM and a tour of OSM's plant identified "several deficiencies that would make it impossible for OSM to manufacture the carrier cases according to Postal Service specifications and drawings": OSM's steel cleaning, pretreatment and phosphate treatment does not meet the requirements of Federal Specification TT-C-490-C, Method II, Type I or II, which are required by the specification for this solicitation; "OSM does not meet all the requirements of MIL-I-45208A, as required by the solicitation, and lacks the necessary testing and control procedures that govern the activities of metal cleaning and pretreatment processes"; and the subcontractor obtained by

¹⁷ The letter notifying OSM of the award to Jebco, is dated July 25, 1991. OSM claims to have received it August 19, and as award to Jebco did not occur until August 13, we assume the date on the letter is in error.

OSM to fabricate the shelves did not have the necessary equipment available at the time to fabricate the shelves, which would cause serious delay in the delivery of the carrier cases.

Furthermore, the contracting officer states that information obtained from the Dun & Bradstreet (D&B) report raised severe questions about OSM's financial status and its ability to timely perform the contract, especially in light of OSM's low working capital and slow payment history.^{1/} For these reasons, she determined that OSM was nonresponsible and awarded the contract to Jebco, the next low offeror.

OSM did not file any response to the contracting officer's report in this protest.

Solicitation No. 104230-91-A-0175 (Protest No. 91-67)

On July 18, 1991, the National Inventory Control Center (NICC) submitted a request to the Headquarters Procurement and Supply Department for a "Noncompetitive Procurement" of 5,984 PSIN 1170K collection mailboxes from Jebco, a previous Postal Service contractor for PSIN 1170K. The request was based on a critical shortage of mail collection boxes due to 1) quality problems with boxes being delivered under the existing OSM contract, and 2) an error in the inventory computer system that indicated more boxes on hand than actually existed. NICC also submitted a memorandum of "Justification for Noncompetitive Procurement" dated July 25, 1991, which further elaborated on the urgent need for these boxes. The request for use of non-competitive procedures was approved by the acting Assistant Postmaster General of the Procurement and Supply Department on August 11, in accordance with PM 6.3.2, concluding that Jebco was the only known manufacturer capable of producing the necessary mailboxes under the requested delivery schedule.

Although OSM was the current Postal Service contractor for this item, it was not considered for the instant solicitation because it was determined nonresponsible. On July 18, 1991, OSM was found to be financially nonresponsible for another solicitation (No. 104230-91-0054) for dual container collection mailboxes, issued a few days prior to the instant solicitation. The Procurement and Supply Department determined that OSM was nonresponsible based upon a financial analysis performed by the Contract Pricing Department (CPD). The Procurement and Supply Department utilized the same financial information made available by that report to reach its determination that OSM was nonresponsible for the instant solicitation as well.

On August 26, a synopsis of the solicitation was mailed to the Commerce Business Daily (CBD) for publication, and was published on September 4. Jebco was also issued a letter of contract on August 26, which it executed on August 30th.

By letter dated September 13, 1991, OSM timely protested the solicitation.^{1/} In its letter

^{3/} She noted that the D&B report also revealed that OSM filed voluntary bankruptcy, under chapter 11, in April 1984 which was settled by November 1988, and is presently operating under a poor credit status. For example, she cites that six of the nine subcontractors cited in OSM's proposal require it to pay cash on delivery for supplies.

^{4/} OSM faxed an earlier letter to this office, dated September 13, 1991, seeking to protest the subject solicitation. The earlier letter was rejected pursuant to PM 4.5.2, because it failed to set forth the basis

of protest, OSM argues that the solicitation is non-competitive, restrictive to a single vendor, and that OSM has completed a similar contract with the Postal Service recently and should, therefore, be afforded the opportunity to compete.

The contracting officer, in his statement, states that although Postal Service policy requires that purchases be made on the basis of adequate competition whenever feasible, PM 4.3.1 allows for noncompetitive purchasing methods when competitive purchasing is not feasible or appropriate. The contracting officer states that the non-competitive purchase in this case was appropriately justified and received approval from the appropriate managers. The contracting officer further asserts that there was "a critical shortage of these items in the Inventory Centers," and that the "NICC had no usable mailboxes and had accumulated back orders for mailboxes of approximately 2,000 boxes at the time of issuing the requisition."

The contracting officer also urges that the use of competitive procedures would have caused a delay in delivery of the first shipment from December, 1991, as was requested, to no earlier than March, 1992. Additionally, the contracting officer states that since OSM was determined nonresponsible, Jebco became the sole supplier with the capability of performing the current solicitation. OSM did not submit a response to the contracting officer's statement.

Discussion

To be determined responsible, a prospective contractor must:

1. Have financial resources adequate to perform the contract;
2. Be able to comply with the required or proposed delivery or performance schedule . . .;
3. Have a good performance record;
4. Have a sound record of integrity and business ethics;
5. Have the necessary organization, experience, accounting and operational controls, technical skills, production and property controls, and quality controls, or the ability to obtain them;
6. Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
7. Be otherwise qualified and eligible to receive award under applicable laws and regulations.

PM 3.3.1 b.

for OSM's objection to the solicitation. The letter was considered to be a "mere statement of intent to file a protest," not a protest. OSM was informed accordingly, and it subsequently faxed another, very concise, protest letter that same day, which was accepted by this office.

The standard for our review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement[s of the contract] with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; accord Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988.

Procurement Manual (PM) 3.3.1 a. sets forth the reasons for responsibility determinations as follows:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility

It is well settled that in a factual dispute we accept as true the statements made by the contracting officer absent controversion by the protester or sufficient evidence to overcome the presumption of correctness which attaches to the contracting officer's statements or action. Barber-Colman Company, P.S. Protest No. 90-34, December 5, 1990, citing Air Transport Association Of America, P.S. Protest No. 90-02, March 23, 1990; Alta Construction Co., P.S. Protest No. 85-2, February 26, 1985; Harper's Ferry Properties, Inc., P.S. Protest No. 76-67, November 8, 1976. In none of these cases did OSM offer any evidence to rebut the contracting officer's reports. Thus, we must accept as true the factual statements of the contracting officers regarding OSM's past performance and current capabilities.

Solicitation No. 479990-91-A-P205 (Protest No. 91-59)

The contracting officer's determination of nonresponsibility in this case was not arbitrary and capricious and was based on substantial evidence. The contracting officer properly analyzed OSM's lack of planning in required areas of the solicitation which reasonably raised significant doubt whether OSM could adequately perform the contract. Additionally, OSM's unsatisfactory performance on a recent postal contract, in addition to its apparent inability to fulfill the present solicitation, justified the contracting officer's finding of nonresponsibility. See Bathey Manufacturing Company, P.S. Protest No. 82-7, March 31, 1982.

OSM failed to submit any additional comments contesting the contract officer's conclusions about its past performance or its ability to fulfill the requirements of the solicitation. Instead, it inadequately relies on its statement of disagreement with the

contracting officer's determination to support its protests. The record before us affords no basis to overturn the determination of nonresponsibility.

Solicitation No. 059990-A-E107 (Protest No. 91-61)

The contracting officer's determination of nonresponsibility was based primarily on the fact that OSM could not meet four of the seven elements required by PM 3.3.1 b. to be determined responsible. It was also based on the conclusion that OSM was not capable of complying with the specifications for the solicitation. The contracting officer doubted whether OSM would "be able to comply with the required or proposed delivery or performance schedule . . ." given that OSM's subcontractor did not possess the necessary equipment to fabricate the shelves. Moreover, the contracting officer was troubled by OSM's stated intention to air dry the shelves, contrary to the Postal Service's specification for Standard Steel Furniture. Also, OSM did not appear to have adequate financial resources to perform the contract, since the D&B report raised doubts about OSM's financial situation and solvency. None of these conclusions was controverted by OSM. The record contains ample evidence supporting the contracting officer's determination that OSM was nonresponsible.

Solicitation No. 104230-91-A-0175 (Protest No. 91-67)

Lastly, we review the issue of whether the contracting officer acted appropriately in issuing the subject solicitation as a noncompetitive procurement.

PM 1.7.1 a. states that "[p]urchases must be made on the basis of adequate competition whenever feasible." That rule is modified by PM 4.3.1 b., which states that "[n]oncompetitive purchasing methods may be used only when competitive purchasing is not feasible or appropriate." Section c. of 4.3.1 lists thirteen exceptions to the rule of competitive purchasing (as noted above). PM 4.3.2 b. further states that "[e]very noncompetitive purchase must be justified in writing and approved in accordance with Management Instruction AS-710-89-8."

Our review of the record indicates that the contracting officer acted appropriately, and in keeping with the requirements of the PM, as he obtained approval from the appropriate managers and processed the requisite documentation. However, whether a noncompetitive purchase is justifiable depends on the circumstances and basis for its use. See PM 4.3.2. While subject to close scrutiny, noncompetitive purchases will be upheld if there is a rational basis for them.

[N]oncompetitive awards may be made where the minimum needs of an agency can be satisfied only by items or services which are unique; where time is of the essence and only one known source can meet the agency's needs within the required time frame; where data is unavailable for competitive procurement; or where only a single source can provide an item which must be compatible and interchangeable with existing equipment In addition, noncompetitive awards may be made where the minimum needs of an agency can be satisfied by only one firm which reasonably could be expected to produce the required item within the required time frame without undue technical risk. (Citations omitted).

Chase Econometrics/Interactive Data Corporation, P.S. Protest No.

83-73, April 27, 1984; see also U.S. Sprint Communications Company, P.S. Protest No. 91-27, July 15, 1991.

In the instant case, the contracting officer explains that a critical shortage of these mailboxes existed, that the NICC did not have any usable mailboxes and had approximately 2,000 outstanding requests for mailboxes at the time of the solicitation, and that the use of competitive procedures would have resulted in a significant delay in delivery, which the Postal Service could ill-afford at the time.^{5/} Moreover, the contracting officer explains that OSM had been determined nonresponsible for the solicitation and consequently excluded, which further justified the issuance of a noncompetitive solicitation.

The circumstances and the justification offered by the contracting officer constituted a reasonable basis for the noncompetitive award to Jebco. OSM has not provided any reasonable response to the contrary.

The protests are denied.

[Signed]

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 5/17/95 WJJ]

^{5/} The contracting officer also states that the sole-source procurement "was limited to the amount needed until a limited a competitive procurement could be conducted with the new specification package."